Nos. 89-1714, 90-113, 90-114

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HARRIET PAULEY, Survivor of JOHN C. PAULEY, *Petitioner*

v.

BETHENERGY MINES, INC., and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

CLINCHFIELD COAL COMPANY, *Petitioner*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and JOHN A. TAYLOR

CONSOLIDATION COAL COMPANY, *Petitioner*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and ALBERT C. DAYTON

On Writs Of Certiorari To The United States Courts Of Appeals For The Third and Fourth Circuits

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BRIEF FOR RESPONDENT ALBERT C. DAYTON (No. 90-114)

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QUESTIONS PRESENTED

1. Whether the Department of Labor ("DOL") interim regulation's "disability causation" and presence of pneumoconiosis rebuttal tests at 20 C.F.R. §§ 727.203(b)(3) and (b)(4) violate the "not . . . more restrictive" mandate of Section 402(f)(2) of the Black Lung Benefits Act, 30 U.S.C. § 902(f)(2), when applied to claimants who meet the invocation requirements of the Department of Health, Education, and Welfare ("HEW") interim provision at 20 C.F.R. § 410.490(b) by ventilatory study evidence?

2. Whether Section 402(f)(2) of the Black Lung Benefits Act, if construed to prohibit the Secretary of Labor from imposing "disability causation" and presence of pneumoconiosis factual inquiries for black lung benefits under the DOL interim regulation, violates the due process clause of the fifth amendment to the United States Constitution?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The fifth amendment to the United States Constitution; Sections 401(a), 402(f), and 422(c) and (j) of the Black Lung Benefits Act, 30 U.S.C. §§ 901(a), 902(f), 932(c),(j); 26 U.S.C. § 9501(d)(1); 20 C.F.R. §§ 410.412, 410.490, 727.203. 89-1714 App. 1-13 sets forth each of these provisions.[1]

STATEMENT

A. Statutory And Regulatory Background

Petitioner Harriet Pauley in No. 89-1714 reviews the statutory and regulatory background relevant to this case, except for the operation of the HEW interim provision at 20 C.F.R. § 410.490 here,[2] where the miner Albert Dayton invoked the presumption that provision confers by ventilatory study evidence under § 410.490(b)(1)(ii).[3] We discuss the operation of the HEW interim provision in "ventilatory study cases" such as this one in Argument § I.A *infra*.

B. This Litigation

Albert Dayton applied for black lung benefits in 1979 after working for 17 years as a coal miner. (Pet. App.

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[1] The "89-1714 App." is the Appendix to the Brief for Petitioner Harriet Pauley in No. 89-1714, with which this case and No. 90-113 are consolidated. Citations to "Pet. App." are to the Appendix to Consolidation Coal Company's petition for certiorari herein.

[2] Like petitioner Pauley, we often refer to 20 C.F.R. § 410.490 as the "HEW interim provision," which is its popular name. Similarly, we often refer to 20 C.F.R. § 727.203 as the "DOL interim regulation." The numerous citations to various provisions of 20 C.F.R. usually omit the "20 C.F.R." citation.

Like petitioner Pauley as well, we refer to the Secretary of Labor and to the respondent Director, Office of Workers' Compensation Programs (the "Director") interchangeably.

[3] In contrast, John Pauley, the miner in No. 89-1714, invoked the HEW presumption by x-ray evidence under § 410.490(b)(1)(i).

at 15) The Department of Labor initially approved his application, but Consolidation Coal Company, the responsible coal mine operator, contested this approval. (*Id.*)

A hearing was held before an Administrative Law Judge (ALJ). (*Id.* at 14-15) The record before the ALJ contained conflicting medical opinions on the questions of disability and the presence of pneumoconiosis. Mr. Dayton presented doctor's opinions that he had clinical pneumoconiosis and also that his respiratory and pulmonary impairment was caused by coal dust exposure. (*Id.* at 21) His treating physician concluded that he was totally disabled from coal mine employment, (*id.*), and that his disability was caused, in part, by his lung disease. (*Id.* at 24) Consolidation Coal Company, on the other hand, presented doctors' opinions that did not diagnose clinical pneumoconiosis and minimized the contribution of dust exposure to Mr. Dayton's lung disease. (*Id.* at 26-27) The company doctors also opined that Mr. Dayton's respiratory and pulmonary impairments were not totally disabling. (*Id.* at 22-24)

The ALJ concluded that Mr. Dayton invoked the DOL interim presumption under § 727.203(a)(2) based on his years of coal dust exposure and on the ventilatory studies of his lung function. (*Id.* at 15, 20) The ALJ found, however, that Mr. Dayton's respiratory impairment was not totally disabling and concluded that this finding established rebuttal of the presumption under § 727.203(b)(2). (*Id.* at 22-24) The ALJ also found that Mr. Dayton did not have pneumoconiosis and concluded that the presumption was rebutted under § 727.203(b)(4) as well. (*Id.* at 26)

Mr. Dayton appealed this decision to the Benefits Review Board, arguing that the ALJ's findings under §§ 727.203(b)(2) and (b)(4) were improper. (*Id.* at 10) Because the Board affirmed the ALJ's finding that Dayton did not have pneumoconiosis so that rebuttal under § 727.203(b)(4) was established (*Id.* at 10-12), the Board declined to decide the § 727.203(b)(2) issue. (*Id.* at n.1) The Board also rejected

Mr. Dayton's position that he was entitled to benefits under the HEW interim provision at § 410.490 because, in its view, the ALJ's finding that he did not have pneumoconiosis precluded such entitlement. (*Id.* at 12 n.2)

Mr. Dayton appealed the Board's decision to the Fourth Circuit, which held that § 727.203(b)(4) violates the "not . . . more restrictive" mandate of Section 402(f)(2) of the Act because the HEW interim provision does not contain a factual inquiry like the one § 727.204(b)(4) authorizes. (*Id.* at 4-5) The court remanded the case for consideration of rebuttal under § 410.490. (*Id.* at 7)[4]

SUMMARY OF ARGUMENT

Section 402(f)(2) of the Act, which prohibits the Secretary of Labor from adjudicating claims like Mr. Dayton's using "criteria" that are "more restrictive" than the "criteria" of the HEW interim provision, requires affirmance of the court of appeals' judgment.

A. In ventilatory study cases like Mr. Dayton's, the DOL interim regulation's "disability causation" and presence of pneumoconiosis rebuttal tests at §§ 727.203(b)(3) and (b)(4), respectively, set forth criteria that are more restrictive than the criteria of the HEW interim provision.

1. Unlike the DOL interim regulation, the HEW interim provision does not authorize benefit denials in ventilatory study cases based upon factual determinations adverse to the miner respecting either the cause of the

[4] Neither the Board nor the Fourth Circuit has yet addressed Mr. Dayton's positions that the ALJ used the wrong legal standards in evaluating the evidence under § 727.203(b)(2) and, if § 727.203(b)(4) is valid, under it. The Fourth Circuit never reached either of these issues, and the Board never reached the § 727.203(b)(2) issue. Consolidation has, therefore, incorrectly stated that the evidence establishes that Mr. Dayton is not totally disabled and does not have pneumoconiosis.

miner's total disability or whether he has pneumoconiosis. Rather, under the HEW interim provision, as it operates in ventilatory study cases, "disability causation" and the presence of pneumoconiosis are conclusively presumed when a miner proves, as Mr. Dayton did, that he has a chronic respiratory or pulmonary impairment, as shown by ventilatory study evidence meeting certain table values, and that he worked in the mines longer than ten years, §§ 410.490(b)(1)(ii), (b)(2), (b)(3), and his opponent is unable to prove that he is performing, or is able to perform, his prior coal mine work or its equivalent. §§ 410.490(c)(1), (c)(2). This understanding of the regulation gives every subsection of the HEW interim provision operative effect in ventilatory study cases. Most particularly, §§ 410.490(b)(2) and (b)(3) are properly understood as companion provisions in ventilatory study cases: a miner who meets the ten-year mining duration requirement of § 410.490(b)(3) thereby secures a presumption that the respiratory or pulmonary impairment shown by his ventilatory studies "ar[o]s[e] out of coal mine employment," § 410.490(b)(3), thus satisfying the causation requirement of § 410.490(b)(2).

2. In the court of appeals, both the Director and the coal companies in this case and in No. 90-113 advanced the argument that, through parenthetical cross-references in its rebuttal tests at §§ 410.490(c)(1) and (c)(2), the HEW interim provision implicitly incorporates additional rebuttal tests like §§ 727.203(b)(3) and (b)(4). In this Court, however, the Director has completely abandoned that contention, and the coal companies have abandoned it as a justification for § 727.203(b)(4). As petitioner Pauley explains in her brief in No. 89-1714, this § 410.490(c) cross-reference argument is completely without merit in any event.

3. The Director now argues that § 410.490(b)(2), one of the *invocation* subparagraphs of the HEW interim provision, authorizes "disability causation" and presence of pneumoconiosis factual inquiries like those at §§ 727.203(b)(3)

and (b)(4). The coal companies advance a similar argument as to § 727.203(b)(4), relying variously on § 410.490(b)(2) or another *invocation* subparagraph of the HEW interim provision, § 410.490(b)(3). Under this new-found assertion, claimants in ventilatory study cases are supposedly faced with some sort of "pre-invocation" rebuttal inquiry into "disability causation" and the presence of pneumoconiosis. However, the text of the HEW interim provision itself, this Court's decision in *Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988), and HEW's contemporaneous interpretation of the provision, among other factors, all show that the assertion is wrong.

B. If this Court accepts our position that the "disability causation" and presence of pneumoconiosis rebuttal tests at §§ 727.203(b)(3) and (b)(4) are more restrictive than the criteria the HEW interim provision sets forth, then affirmance of the judgment below is required because the "disability causation" and presence of pneumoconiosis criteria in §§ 727.203(b)(3) and (b)(4) are the types of "criteria" that Section 402(f)(2) says cannot be more restrictive in the DOL interim regulation than they are in the HEW interim provision.

1. As petitioner Pauley explains in her brief in No. 89-1714, this Court's decision in *Sebben* strongly supports reading the term "criteria" in Section 402(f)(2) to mean *all* criteria in the HEW interim provision, including its criteria for "disability causation" and the presence of pneumoconiosis, both of which, in ventilatory study cases, are conclusively presumed. And if the term "criteria" in Section 402(f)(2) is instead read as "total disability criteria," as this Court in *Sebben* suggested it might be, then the statutory definition of "total disability" in Section 402(f)(1)(A), 30 U.S.C. § 902(f)(1)(A), which defines that term to include not only the severity of a miner's impairments but also both "disability causation" and the pres-

ence of pneumoconiosis, similarly obliges the conclusion that those two criteria are Section 402(f)(2) "criteria."

2. The Director suggests that the HEW interim provision in ventilatory study cases, read to presume conclusively "disability causation" and the presence of pneumoconiosis, would have violated the Act when it was promulgated. The Director points to several statutory provisions that authorize or require factual inquiries into "disability causation" or the presence of pneumoconiosis in Part B cases. These factors, among others, he says, make it "[un]reasonable" to conclude that the Congress that enacted Section 402(f)(2) believed that benefits could be awarded to claimants under Part B (and under the HEW interim provision in particular) absent factual inquiries into "disability causation" and the presence of pneumoconiosis. The coal companies advance similar arguments, but to no avail. In promulgating the HEW interim provision, the Secretary of HEW was exercising legislative authority that the statute granted her. And we adopt petitioner Pauley's extensive answer to the Director's reliance on the several provisions of the Act that authorize or require factual inquiries into "disability causation" or the presence of pneumoconiosis. Mrs. Pauley explains in her brief that the Director simply misreads some of the provisions he relies upon and that the reading he gives Section 402(f)(2), based on his interpretation of other provisions, would completely subvert the outcome Congress wanted when it enacted Section 402(f)(2).

C. The Director's and the coal companies' companion pleas for deference to the Secretary of Labor's current interpretations of the HEW interim provision and Section 402(f)(2) are unavailing.

1. An agency's interpretations of its own regulations are generally entitled to considerable deference. However, so far as deference to the Secretary of Labor's interpretation of the HEW interim provision as a regulation is concerned, this general rule is inapplicable, as the HEW interim provision is not a Department of Labor regulation. Moreover, the Secretary of HEW's interpretation of that provision supports our position.

2. Deference to an administrative agency's construction of a statute is inappropriate if a court, "[e]mploying traditional tools of statutory construction," is able to discern Congress' intent in enacting the measure. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987). Here, those tools, principally the statutory text itself, do permit this Court to discern what Section 402(f)(2) and the HEW interim provision mean. Accordingly, and as in *Sebben*, the current interpretations of Section 402(f)(2) and the HEW interim provision that the Secretary proffers are not entitled to any deference.

3. The Secretary of Labor's current interpretations of both the HEW interim provision and Section 402(f)(2) are not ones that are contemporaneous with the enactment of Section 402(f)(2). Nor are they consistent with several prior interpretations the Secretary has advanced, including the interpretations she advanced in the court below. These factors independently make the Secretary's interpretations of the HEW interim provision and Section 402(f)(2) unworthy of deference. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212-13 (1988).

D. A coal operator who shows under Section 422(c) of the Act, 30 U.S.C. 932(c), that its own mines did not cause a claimant's "total disability due to pneumoconiosis" thereby shifts liability to the Black Lung Disability Trust Fund for payment of benefits to a claimant who prevails under Section 402(f)(2) and the HEW interim provision. This opportunity that Section 422(c) affords a coal operator to avoid *liability* for payment of black lung benefits is an even broader opportunity than the one the coal com-

panies incorrectly say would be unconstitutionally absent from the statutory scheme if Section 402(f)(2) were read to impose liability upon a coal company based on conclusive presumptions of "disability causation" and the presence of pneumoconiosis in ventilatory study cases. Section 422(c) is therefore a complete answer to the coal companies' due process challenge to Section 402(f)(2) as we read it. Moreover, independently of Section 422(c), *Usery v. Turner Elkhorn Mining Co.*, 425 U.S. 1 (1975) establishes that Section 402(f)(2), as applied to ventilatory study cases, is constitutional.

ARGUMENT

Pittston Coal Group v. Sebben, 488 U.S. 105 (1988) teaches that, pursuant to Section 402(f)(2) of the Act, the HEW interim provision at § 410.490 sets forth the *statutory* standard of restrictiveness for the "criteria" the Secretary may apply to claims, including Mr. Dayton's claim here, that are subject to the "not . . . more restrictive" mandate of Section 402(f)(2). *Sebben*, 488 U.S. at 113-16. In this context, the questions presented here are: (1) whether any rebuttal provision of the DOL interim regulation at § 727.203(b) is inconsistent with Section 402(f)(2) (*i.e.*, whether any such rebuttal provision is "more restrictive" than the "criteria" set forth in the HEW interim provision); and (2) if any rebuttal provision is invalid, whether applying the resulting eligibility scheme violates the due process rights of coal companies. *See id.* at 119.

No. 89-1714, consolidated with this case, presents these same two questions. That case, however, is an "x-ray case," one in which the claimant successfully invoked the HEW interim presumption using x-ray evidence under § 410.490(b)(1)(i). No. 89-1714 App. at 39. This case, in contrast, is a "ventilatory study case," one in which the claimant successfully invoked the HEW interim presumption

using ventilatory study evidence under § 410.490(b)(1)(ii). The distinction is significant because the HEW interim provision does not operate in exactly the same way in ventilatory study cases as it does in x-ray cases. In that connection, the HEW interim provision defines somewhat different *statutory* standards of restrictiveness under Section 402(f)(2) in the two types of cases.

In No. 89-1714, Mrs. Pauley explains why, in an x-ray case such as hers, the "disability causation" rebuttal test at § 727.203(b)(3) is "more restrictive" than the "criteria" in the HEW interim provision and violates Section 402(f)(2). We fully agree with her analysis. However, the differences in the ways the HEW interim provision operates in x-ray and ventilatory study cases require a somewhat different analysis here.[5] We submit that in ventilatory study cases such as this one, the DOL interim regulation is "more restrictive" than the HEW interim provision with respect to *both* the "disability causation" rebuttal test at § 727.203(b)(3) and the presence of pneumoconiosis rebuttal test at § 727.203(b)(4). *See* § I.A *infra*. We also submit that both these rebuttal tests transgress Section 402(f)(2). *See* § I.B *infra*. We further submit that the Secretary of Labor's contrary interpretations of the HEW interim provision and Section 402(f)(2) are not entitled to deference. *See* § I.C *infra*. Finally, we submit that the resulting statutory eligibility scheme—one in which a claimant's eligibility is established without a complete factual inquiry into whether the claimant's total disability is due to pneumoconiosis arising out of coal mine employment—is consistent with the due process clause of the fifth amendment. *See* § II *infra*.

[5] The analyses in the two types of cases are not completely distinct but overlap in important ways. Indeed, as we explain *infra*, the ways in which the respective analyses overlap allow us to adopt major elements of Mrs. Pauley's argument. *See* Brief of Petitioner Harriet Pauley ("89-1714 Pet. Br.") at 19-49.

I. SECTION 402(f)(2) OF THE ACT PROHIBITS THE DIRECTOR FROM APPLYING THE DOL INTERIM REGULATION'S REBUTTAL TESTS AT §§ 727.203(b)(3) AND (b)(4) TO CLAIMS THAT MEET THE INVOCATION REQUIREMENTS OF THE HEW INTERIM PROVISION BY VENTILATORY STUDY EVIDENCE.

A. In Cases In Which The Claimant Meets The Invocation Requirements Of The HEW Interim Provision By Ventilatory Study Evidence, The DOL Interim Regulation's Rebuttal Tests At §§ 727.203(b)(3) And (b)(4) Set Forth More Restrictive Criteria Than The Criteria In The HEW Interim Provision.

Both the HEW interim provision and the DOL interim regulation include rebuttal tests. §§ 410.490(c), 727.203(b). All rebuttal tests in the two provisions enumerate ways by which the presumptions of eligibility that the respective provisions provide, once invoked, may be defeated. *Sebben*, 488 U.S. at 109; *Mullins Coal Co. v. Director, O.W.C.P.*, 484 U.S. 135, 143-44, 154 (1987).

The first two rebuttal tests of the DOL interim regulation, §§ 727.203(b)(1) and (b)(2), are substantially the same as, and thus do not set forth more restrictive criteria than, the only two rebuttal tests of the HEW interim provision, §§ 410.490(c)(1) and (c)(2). However, the DOL interim regulation contains two additional rebuttal tests, §§ 727.203(b)(3) and (b)(4), neither of which has a discrete companion test in the HEW interim provision. Our position is that in ventilatory study cases both §§ 727.203(b)(3) and (b)(4) set forth "criteria" that are more restrictive than the criteria in the HEW interim provision because §§ 727.203(b)(3) and (b)(4) permit the opponents of the claims to defeat the claims in ways the HEW interim provision does not.

Both interim provisions provide that claimants who satisfy the requirements of their respective invocation subsections in ventilatory study cases will, *inter alia*, "be presumed to be totally disabled *due to pneumoconiosis arising out of coal mine employment.*" §§ 410.490(b), (b)(3), 727.203(a) (emphasis added). In ventilatory study cases

both interim provisions therefore confer the presumptions (a) that the miner's disability "aris[es] out of coal mine employment" (*i.e.*, "disability causation") and (b) that he has pneumoconiosis. Under the DOL interim regulation, the test at § 727.203(b)(3) allows the presumption of "disability causation" to be rebutted and the test at § 727.203(b)(4) allows the presumption of the presence of pneumoconiosis to be rebutted. In contrast, the HEW interim provision contains no provision, either in its invocation subsection, § 410.490(b), or in its rebuttal subsection, § 410.490(c), that directs any factual inquiry in ventilatory study cases concerning either "disability causation" or the presence of pneumoconiosis. "Disability causation" and the presence of pneumoconiosis are conclusively presumed under the HEW interim provision in ventilatory study cases.

In their briefs on the merits in the Fourth Circuit, neither the Director nor the coal companies that oppose Messrs. Dayton and Taylor in this case and in No. 90-113 contended that the HEW interim provision sets forth any factual inquiry that corresponds to the particular factual inquiry that either § 727.203(b)(3) or (b)(4) sets forth. Brief of the Federal Respondent ("Dir. 4th Cir. Br."), Brief of Respondent Consolidation Coal Co., *Dayton v. Consolidation Coal Co. and Director, O.W.C.P.*, 895 F.2d 173 (4th Cir. 1990), *petition for cert. granted*, 59 U.S.L.W. 3325 (October 29, 1990) (No. 90-114); Brief of the Appellee [Clinchfield Coal Co.], *Taylor v. Clinchfield Coal Co. and Director, O.W.C.P.*, 895 F.2d 178 (4th Cir. 1990), *petition for cert. granted*, 59 U.S.L.W. 3325 (October 29, 1990) (No. 90-113). They thereby implicitly conceded our position that the DOL interim regulation's rebuttal tests at §§ 727.203(b)(3) and (b)(4) *do* set forth criteria that are more restrictive than the criteria of the HEW interim provision.[6]

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[6] Relying on other grounds, the Director and the coal companies nevertheless opposed awarding benefits to Messrs. Dayton and Taylor.

The Director and the coal companies, however, have backed away from this concession. Indeed, since filing their briefs on the merits to the Fourth Circuit, all have changed positions twice. Moreover, the Director's present position conflicts dramatically with the present position of the coal companies. These varying and inconsistent positions are the product of the Director's and the coal companies' frantic attempts to provide after-the-fact justifications to square §§ 727.203(b)(3) and (b)(4) with the "not . . . more restrictive" mandate of Section 402(f)(2) of the Act. But §§ 727.203(b)(3) and (b)(4) are unlawful implementations of Section 402(f)(2), so that none of the attempted justifications that the Director and coal companies posit is valid.

1. The HEW Interim Provision's Rebuttal Tests At §§ 410.490(c)(1) and (c)(2) Do Not Implicitly Incorporate Any Rebuttal Test Like That At § 727.203(b)(3) Or (b)(4).

In their petitions for rehearing in the Fourth Circuit in this case and in No. 90-113, the Director and Clinchfield Coal Company departed from their briefs on the merits to argue that §§ 727.203(b)(3) and (b)(4) do not set forth more restrictive criteria than the criteria of the HEW interim provision. This was so, they contended at the time, because the HEW interim provision's rebuttal tests at §§ 410.490(c)(1) and (c)(2) implicitly incorporate additional rebuttal tests like both §§ 727.203(b)(3) and (b)(4) of the DOL interim regulation. Respondent Director's Petition for Rehearing and Suggestion for Rehearing En Banc at 11-12, Clinchfield Coal Company's Petition for Rehearing at 8-9, *Clinchfield Coal Co.*, 895 F.2d 178; [Director, O.W.C.P.'s] Petition for Rehearing and Suggestion for Rehearing In Banc at 7-8, *Dayton*, 895 F.2d 173.[7]

[7] Consolidation Coal Company did not file a petition for rehearing to the Fourth Circuit in this case but nevertheless changed its

(Footnote continued on following page)

As we point out at pp. 14-15 *infra*, the Director has now abandoned this rationale entirely, and the coal companies in this case and in No. 90-113 have now abandoned it as a justification for § 727.203(b)(4). The only Court ever to accept the rationale, the Third Circuit in No. 89-1714, applied the rationale to validate § 727.203(b)(3). That court observed that §§ 410.490(c)(1) and (c)(2) of the HEW interim provision parenthetically cite § 410.412(a)(1), which, the court said, "refers to a miner being 'totally disabled due to pneumonoconiosis.'" *Bethenergy Mines*, 890 F.2d at 1302. On this basis, it held that these parenthetical citations to § 410.412(a)(1) implicitly incorporate into the HEW interim provision an additional "disability causation" rebuttal test like the one at § 727.203(b)(3) of the DOL interim regulation. *Id.*

In her brief to this Court, Mrs. Pauley, the petitioner in No. 89-1714, demonstrates persuasively that the text of the HEW interim provision itself and the contemporaneous interpretation of HEW's interim provision that HEW set forth in a supplement to its Coal Miner's Benefits Manual, among other factors, contradict the Third Circuit's holding. 89-1714 Pet. Br. at 23-30. We adopt Mrs. Pauley's persuasive analysis. Like the Director, the coal companies should have abandoned the argument entirely because it is incorrect.

[7] *continued*
position as well by making this same argument in its petition for certiorari to this Court. Petition at 15-16. Both the Director and Bethenergy Mines, Inc. also made this argument in their briefs on the merits to the Third Circuit in No. 89-1714. Brief of the Federal Respondent at 18-22, Brief for the Petitioner Bethenergy Mines, Inc. at 18-20, *Bethenergy Mines, Inc. v. Director, O.W.C.P. and Pauley*, 890 F.2d 1295 (3rd Cir. 1989), *petition for cert. granted*, 59 U.S.L.W. 3325 (October 29, 1990) (No. 89-1714).

2. The Invocation Subparagraphs Of The HEW Interim Provision At §§ 410.490(b)(2) And (b)(3) Do Not Authorize Any Factual Inquiries Like The Ones That The DOL Interim Regulation's Rebuttal Tests At §§ 727.203(b)(3) And (b)(4) Authorize.

In their briefs to this Court, the Director and the coal companies in this case and in No. 90-113 have again changed their positions. The Director now argues that § 410.490(b)(2), one of the *invocation* subparagraphs of the HEW interim provision, authorizes factual inquiries like those that both of the DOL interim regulation's rebuttal tests at §§ 727.203(b)(3) and (b)(4) authorize, thereby validating these rebuttal tests. Brief of the Director, O.W.C.P. ("Dir. Br.") at 21-24. The coal companies now argue that § 727.203(b)(4) is valid because the *invocation* subparagraph of the HEW interim provision at either § 410.490(b)(2) or (b)(3)—the companies say they are unsure which of the two subparagraphs—authorizes a factual inquiry like the one that the § 727.203(b)(4) rebuttal test authorizes. Joint Brief for the Petitioners Clinchfield Coal Company and Consolidation Coal Company ("Coal Co. Br.") at nn. 32, 34. In contrast to the Director, however, the coal companies continue to argue that § 727.203(b)(3) is valid because the HEW interim provision's rebuttal tests at §§ 410.490(c)(1) and (c)(2) implicitly incorporate a rebuttal test like that at § 727.203(b)(3). *Id.* at 28-31.

So far as we are aware, neither the Secretary of Labor nor any coal company has ever before argued in any case in any forum that any of the *invocation* provisions of the HEW interim provision authorizes either a "disability causation" factual inquiry like that at § 727.203(b)(3) or, in ventilatory study cases, a presence of pneumoconiosis factual inquiry like that at § 727.203(b)(4). This new-found position, which does not bring with it any judicial or other authoritative support whatsoever, is wrong. Rather, both "disability causation" and the presence of pneumoconiosis

are conclusively presumed when a claimant proves the other significant facts that are necessary to invoke the HEW interim provision in ventilatory study cases.

a. The Text Of The HEW Interim Provision. As the portion of the text of § 410.490(b) that precedes § 410.490(b)(1) expressly provides, meeting the requirements of § 410.490(b) confers only a limited presumption—that the miner is "totally disabled due to pneumoconiosis." § 410.490(b). Significantly, this portion of the text of § 410.490(b) does *not* provide that meeting the requirements of § 410.490(b) confers any presumption that the miner's totally disabling pneumoconiosis "arose out of coal mine employment." Indeed, that the miner's affliction "arose out of coal mine employment" is itself one of the discrete requirements that a claimant must establish in order to obtain § 410.490(b)'s limited presumption that he is "totally disabled due to pneumoconiosis." § 410.490(b)(2).

The drafters structured § 410.490(b) this way to effectuate their decision to require one category of miners to prove, rather than benefit from a presumption, that their affliction arose out of coal mine employment. Specifically, those miners who satisfy § 410.490(b)(1) by x-ray, biopsy, or autopsy evidence under § 410.490(b)(1)(i) but who worked in the mines *fewer than ten years* (*i.e.*, whose mining careers were too short to obtain the presumption of causation in § 410.416 or § 410.456, the sections of the HEW permanent regulations that § 410.490(b)(2) parenthetically references) must satisfy the § 410.490(b)(2) causation requirement by proving affirmatively that their pneumoconiosis arose out of coal mine employment. § 410.490(b)(2). Miners who successfully make this proof obtain the presumption that they are "totally disabled due to pneumoconiosis." § 410.490(b). Accordingly, they are presumed to be totally disabled due to the pneumoconiosis that, as they proved affirmatively, "arose out of coal mine employment." § 410.490(b)(2). The opponents of these claims then

have the opportunity to defeat the claims under the HEW interim provision's rebuttal subsection, § 410.490(c).

Neither of the other two categories of miners to whom the HEW interim provision is expressly available have to prove that their afflictions arose out of coal mine employment in order to satisfy § 410.490(b)(2). Rather, the § 410.490(b)(2) causation requirement is presumed with respect to both remaining categories of miners. First, miners who both satisfy § 410.490(b)(1) by x-ray, biopsy, or autopsy evidence under § 410.490(b)(1)(i) and worked in the mines *ten years or more* automatically obtain the presumption of causation that § 410.416 or § 410.456 (the sections of HEW's permanent regulations that § 410.490(b)(2) parenthetically references) confers, thereby satisfying the § 410.490(b)(2) causation requirement. Miners who satisfy § 410.490(b)(2) by obtaining this presumption of causation also obtain the separate presumption that they are "totally disabled due to pneumoconiosis." § 410.490(b). Accordingly, they are presumed to be totally disabled due to the pneumoconiosis that, as is separately presumed, "arose out of coal mine employment." § 410.490(b)(2) (referencing §§ 410.416 and 410.456).

The opponents of these claims then have the opportunity to defeat the claims under the HEW interim provision's rebuttal subsection, § 410.490(c). Section 410.490(c), entitled "*Rebuttal of the presumption*," provides that "[t]he presumption in paragraph (b) of this section may be rebutted if" either of its two rebuttal tests is satisfied. § 410.490(c). The Director and the coal companies contend, however, that § 410.490(b)(2), an *invocation* requirement of the HEW interim provision, incorporates some sort of "pre-invocation" *rebuttal*. Coal Co. Br. at 26-27; Dir. Br. at 24. Specifically, they argue or suggest that with respect to miners who worked long enough in the mines to obtain the causation presumption that the permanent regulations at §§ 410.416 and 410.456 provide, § 410.490(b)(2) incorporates the rebuttal avenues that §§ 410.416 and 410.456 also provide. Coal Co. Br. at 26-27; Dir. Br. at 24. The Director argues that such pre-invocation rebuttal under § 410.490(b)(2) is the mechanism by which the HEW interim provision authorizes factual inquiries concerning "disability causation" and the presence of pneumoconiosis that the DOL interim regulation authorizes in its rebuttal tests at §§ 727.203(b)(3) and (b)(4), respectively. Dir. Br. at 24.[8] The coal companies argue that the posited pre-invocation rebuttal inquiry under § 410.490(b)(2), which, they say, would apply to ventilatory study cases as well as x-ray cases,[9] would entail only a factual inquiry concerning the presence of pneumoconiosis. Coal Co. Br. at 26-27.

The Director and the coal companies are wrong. First, as we discuss at pp. 19-21 *infra*, §§ 410.416 and 410.456 do not apply to ventilatory cases like Mr. Dayton's at all. Moreover, this Court has already rejected the contention of the Director and the coal companies that § 410.490(b)(2) incorporates some sort of pre-invocation rebuttal. Recognizing in *Sebben* that, as permanent regulations, "§§ 410.416 and 410.456 permit rebuttal of the[ir]

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[8] By taking this position, the Director also contradicts yet another position that he took in the Fourth Circuit in this case. Observing both that § 727.203(b)(3) pertains to "disability causation" and that "§ 410.490(b)(2) . . . incorporates § 410.416 by reference," the Director contended below that "[t]he issues addressed by § 410.416 and § 727.203(b)(3) are entirely different and independent." [Director, O.W.C.P.'s] Petition for Rehearing and Suggestion for Rehearing In Banc at 12, *Dayton*, 895 F.2d 173. The Director's position before the Fourth Circuit, which is the correct position, conflicts squarely with the position he has taken in his brief to this Court that § 410.490(b)(2) incorporates a "disability causation" factual inquiry like that at § 727.203(b)(3).

[9] The coal companies thereafter contradict themselves twice, first by acknowledging that they are unsure whether § 410.490(b)(2) applies to ventilatory study cases, Coal Co. Br. at n. 32, then by stating that "it seems" that § 410.490(b)(2) does *not* apply to ventilatory study cases. *Id.* at n. 34.

presumption[s]" of causation, the Court nevertheless held, with respect to the operation of the HEW interim provision, that "it is plainly not the intended purpose of paragraph (b)(2) [§ 410.490(b)(2)] to serve as a rebuttal provision. . . ." *Sebben*, 488 U.S. at 120.[10] Because § 410.490(c), by its express terms, is the rebuttal subsection of § 410.490, any conclusion that the invocation provision at § 410.490(b)(2) incorporates some sort of pre-invocation rebuttal would be counter-intuitive. If HEW had wanted to incorporate the rebuttal avenues of §§ 410.416 and 410.456 into its interim presumption, it would have included them in § 410.490(c).[11]

Section 410.490(b)(3) does not apply to either of the preceding categories of miners, both involving miners able to invoke the HEW interim provision using x-ray, biopsy, or autopsy evidence. Rather, by its express terms, § 410.490(b)(3) applies only to the remaining category of miners to whom the HEW interim provision is expressly

[10] That this was a holding of the Court in *Sebben* is apparent because it was essential to the Court's conclusion that requiring all miners in x-ray cases to prove at least ten years of coal mine employment would render § 410.490(b)(2) "entirely superfluous," *Sebben*, 488 U.S. at 120, a conclusion that was one of the factors on which the Court based its holding that § 410.490(b)(3) does not apply to x-ray cases. *Id.* at 119-20. Moreover, the Director has recognized that the Court "explicitly held" in *Sebben* that § 410.490(b)(2) does not allow any sort of pre-invocation rebuttal inquiry. [Director O.W.C.P.'s] Petition for Rehearing and Suggestion for Rehearing In Banc at 14, *Dayton*, 895 F.2d 173. Perhaps this is why the Director words the contrary contention he makes in his brief to this Court so obliquely. Dir. Br. at 24. In addition, the dissenting justices in *Sebben* concluded that miners who prove that they worked at least ten years in the mines "in so doing satisfy paragraph (b)(2) [§ 410.490(b)(2)]." *Id.* at 130 (Stevens, J., dissenting). The dissenting justices thereby demonstrated that they agreed with the majority that § 410.490 does not provide any sort of pre-invocation rebuttal.

[11] The circumstances attending the adoption of the HEW interim provision explain why the provision does not allow these additional rebuttal avenues. *See* § I.A.2.c *infra*.

available, miners able to invoke the provision using ventilatory study evidence. § 410.490(b)(3) (citing § 410.490(b)(1)(ii)); *Sebben*, 488 U.S. at 119-20.[12] As in those x-ray cases in which the miners worked at least ten years in the mines, miners in ventilatory study cases satisfy § 410.490(b)(2) by obtaining a presumption that their afflictions arose out of coal mine employment. However, unlike x-ray cases, in which §§ 410.416 and 410.456 are the provisions that automatically confer the causation presumption that satisfies § 410.490(b)(2), in ventilatory study cases § *410.490(b)(3)* is the provision that automatically confers the causation presumption that satisfies § 410.490(b)(2). Significantly, §§ 410.416 and 410.456, by their express terms, confer the causation presumption that satisfies the § 410.490(b)(2) requirement only for miners who both worked in the mines at least ten years *and* are "suffering or suffered from pneumoconiosis." §§ 410.416, 410.456.[13] While miners who meet the § 410.490(b)(1) requirement by x-ray, biopsy, or autopsy evidence under § 410.490(b)(1)(i) necessarily prove thereby that they actually have medical pneumoconiosis, the decisive fact is that miners who meet the § 410.490(b)(1) requirement instead by ventilatory study evidence under § 410.490(b)(1)(ii) do *not* thereby prove that they actually have pneumoconiosis. *See* pp. 26-27 and nn. 16, 21 *infra*. To be sure, the dissenting justices in *Sebben* believed that miners who meet both the ventilatory study requirement and the employment duration requirement of § 410.490 (b)(1)(ii) thereby "establish the presence of pneumoconiosis

[12] The dissenting justices in *Sebben* believed that § 410.490(b)(3) contains a "scrivener's error" that should be corrected so that the section applies to x-ray cases rather than to ventilatory study cases. The *Sebben* majority's rejection of the dissent's view is supported by the discussions at pp. 20-23 *infra* and in 89-1714 Pet. Br. at n. 11.

[13] Sections 410.416 and 410.456 are substantively indistinguishable except that § 410.416 applies to the claims of living miners and § 410.456 applies to the claims of the survivors of deceased miners. §§ 410.416, 410.456.

. . . *by inference*." *Sebben*, 488 U.S. at 128 (Stevens, J., dissenting) (emphasis added). But it is doubtful that establishing merely the inferential, and not the actual, presence of pneumoconiosis would be sufficient to obtain the presumption set forth in § 410.416 or § 410.456 that the miner's pneumoconiosis arose out of his coal mine employment.[14]

The drafters eliminated this problem by including in the HEW interim provision § 410.490(b)(3), which operates in the same way that §§ 410.416 and 410.456 (the sections that § 410.490(b)(2) parenthetically references) operate in the HEW interim provision, with two significant exceptions: (a) the drafters made § 410.490(b)(3), by its express terms, applicable only to ventilatory study cases, and (b) they omitted from § 410.490(b)(3) a requirement that the miner must have pneumoconiosis, the requirement they included in §§ 410.416 and 410.456. These distinct attributes enable § 410.490(b)(3) to serve the same function in

[14] If proving at least ten years of work in the mines and establishing the presence of "pneumoconiosis . . . by inference" would be sufficient to obtain the presumption set forth in § 410.416 or § 410.456, then miners who meet the requirements of § 410.490(b)(1)(ii) in ventilatory cases would automatically satisfy the HEW interim provision's invocation requirement at § 410.490(b)(2). § 410.490(b)(2) (referencing §§ 410.416 and 410.456). Otherwise, however, absent § 410.490(b)(3) miners who meet the requirements of § 410.490(b)(1)(ii) would, notwithstanding their lengthy tenures in the mines, be able to satisfy § 410.410(b)(2) only by proving affirmatively that the chronic respiratory or pulmonary impairments shown by their ventilatory studies arose out of coal mine employment. Having to make such proof, unlike having to prove that a miner's known medical pneumoconiosis arose out of coal mine employment, would have been extremely difficult, if not impossible. *E.g.*, *Black Lung Benefits Eligibility (Oversight): Hearing Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. 82 (1973) (testimony of Lowell Martin, M.D., stating that "correlating [shortness of breath] with his [a miner's] job . . . is one heck of a problem when you want to get scientific"); *see also* 89-1714 Pet. Br. at 3-6, 8-10. As discussed in the text, the inclusion of § 410.490(b)(3) in the HEW interim presumption made providing such proof unnecessary.

ventilatory study cases that §§ 410.416 and 410.456 serve in x-ray cases. Sections 410.416 and 410.456, on the one hand, and 410.490(b)(3), on the other, satisfy the causation requirement of § 410.490(b)(2) for x-ray cases and ventilatory cases, respectively. Just as §§ 410.416 and 410.456 satisfy § 410.490(b)(2) in x-ray cases for miners who mined at least ten years by conferring the presumption that the pneumoconiosis shown by their x-ray, biopsy, or autopsy evidence arose out of coal mine employment, so too does § 410.490(b)(3) satisfy § 410.490(b)(2) in ventilatory study cases for miners who mined at least ten years (*i.e.*, all miners who meet the requirements of § 410.490(b)(1)(ii)) by conferring the presumption that the respiratory or pulmonary impairments shown by their ventilatory studies "ar[o]s[e] out of coal mine employment." § 410.490(b)(3). That conferring this causation presumption is one of § 410.490(b)(3)'s salient features is apparent because, as discussed at p. 15 *supra*, the portion of the text of § 410.490(b) that precedes § 410.490(b)(1) provides that meeting the requirements of § 410.490(b) does not otherwise confer the presumption that the miner's affliction arose out of coal mine employment but only the limited presumption that the "miner is totally disabled due to pneumoconiosis." § 410.490(b).

Another salient feature of § 410.490(b)(3) is that the mining duration requirement it specifies is ten years, a shorter tenure than the 15 years set forth in § 410.490(b)(1)(ii). *Compare* § 410.490(b)(1)(ii) *with* § 410.490(b)(3). This seeming discrepancy is what prompted the dissenting justices in *Sebben* to conclude that § 410.490(b)(3) contains a "scrivener's error." *Sebben*, 488 U.S. at 128-30 (Stevens, J., dissenting). But while the HEW interim provision may not be a model of clarity, the differing duration requirements in §§ 410.490(b)(1)(ii) and (b)(3) do not conflict with each other.

On October 17, 1972, less than three weeks after HEW's interim provision became effective as a regulation, 37 Fed.

Reg. 20634 (1972), HEW supplemented Part IV of its existing Coal Miner's Benefits Manual (the "Manual," a copy of which petitioner Pauley in No. 89-1714 has lodged with the Court). That supplement set forth in detail HEW's understanding of its interim provision. Manual at § IB6. The first paragraph of § IB6(d) of the Manual parallels and interprets § 410.490(b)(3) of the HEW interim provision. Besides reiterating § 410.490(b)(3)'s express terms, such as that it applies only to ventilatory study cases and is available only to miners who worked at least ten years in the mines, the first paragraph of § IB6(d) of the Manual varies from § 410.490(b)(3) by adding a parenthetical citation to § IB3(b) of the Manual. Section IB3(b) of the Manual parallels and interprets § 410.414(b), a provision of HEW's permanent regulations that sets forth a presumption available to miners who worked in the mines, depending on varying circumstances, either a minimum of 15 years, § 410.414(b)(3), or "many years . . . (although less than 15)." § 410.414(b)(4).

The presumption at § 410.414(b) of HEW's permanent regulations is far more restrictive to claimants than HEW's interim presumption at § 410.490, but the parenthetical reference in the first paragraph of § IB6(d) of the Manual to § IB3(b) demonstrates that the drafters derived the HEW interim provision's ventilatory study presumption at least in part from the § 410.414(b) permanent presumption. Indeed, § IB3(b)(4) of the Manual, in interpreting § 410.414(b)'s mining duration requirement of "many years . . . (although less than 15)," even addresses the HEW interim provision specifically, stating that "[f]or purposes of the interim criteria in B.6 of this part [§ IB6 of the Manual], the presumption will normally be made where the miner had *at least 10 years of coal mine work*." Manual § IB3(b)(4) (emphasis added). Thus, besides explaining that the 15-year mining duration requirement in § 410.490(b)(1)(ii) is derived from the permanent regulation at § 410.414(b) and that the ten-year mining duration requirement of § 410.490(b)(3) is, in turn, derived from that 15-year presumption, the parenthetical reference to § IB3(b) establishes that the ten-year mining duration is the one that has operative effect.

Consistently, the 15-year mining duration requirement of § 410.490(b)(1)(ii) is not set forth in § IB6(c)(1)(B), the provision of the Manual that otherwise parallels § 410.490(b)(1)(ii), or in any other provision of the Manual pertaining to the interim provision. Significantly, that the Manual completely ignores the 15-year mining duration requirement of § 410.490(b)(1)(ii) is also consistent with, and is therefore a permissible interpretation of, the text of the HEW interim provision. The HEW interim provision expressly provides, in relevant part, that a "miner will be [entitled to the presumption that the provision confers] if[,] . . . [i]n the case of a miner employed for at least 15 years in [the mines, his] ventilatory studies [meet specified values]." §§ 410.490(b),(b)(1)(ii). Because the provision does not state that in ventilatory study cases the presumption will be conferred *only* on miners who worked in the mines at least 15 years, it is compatible with an interpretation that would confer its presumption in ventilatory study cases on miners who worked fewer than 15 years in the mines.[15]

Thus, to invoke the HEW interim presumption by ventilatory study evidence, claimants need only prove affirmatively both that their ventilatory studies meet the requisite table values, § 410.490(b)(1)(ii), and that they worked at least ten years in the mines. §§ 410.490(b)(3). In this

[15] The coal companies, in contending incorrectly that "[t]he ten year requirement in paragraph (b)(3) [§ 410.490(b)(3)] in light of the fifteen year requirement in paragraph (b)(1)(ii) [§ 410.490(b)(1)(ii)] is inexplicable," Coal Co. Br. at 29 n. 34, exhibit their lack of understanding of the HEW interim provision.

case, the ALJ concluded both that Mr. Dayton worked in the mines for 17 years, Pet. App. at 15, and that his ventilatory studies meet the table values at § 727.203(a)(2), *id.* at 19-20, which are identical to the table values in the HEW interim provision at § 410.490(b)(1)(ii). *Compare* § 410.490(b)(1)(ii) *with* § 727.203(a)(2). Mr. Dayton therefore invoked the HEW interim provision, and the Director is wrong in contending otherwise. Dir. Br. at 21.

Once the HEW interim presumption is invoked by ventilatory study evidence, the opponents of these claims then have the opportunity to defeat the claims under the HEW interim provision's rebuttal subsection, § 410.490(c). As discussed at pp. 16-18 *supra*, the Director and the coal companies have contended incorrectly that § 410.490(b)(2) incorporates some sort of "pre-invocation" rebuttal. The Director apparently contends that § 410.490(b)(3), too, incorporates some type of pre-invocation rebuttal. Dir. Br. at n. 16. Section 410.490(b)(3), however, contains nothing in its text and no citations that could even arguably provide such pre-invocation rebuttal. § 410.490(b)(3). Nevertheless, the Director, after quoting much of the first paragraph of § IB6(d) of HEW's Coal Miner's Benefits Manual (the Manual provision that parallels § 410.490(b)(3)), concludes that "the manual contemplated (somewhat paradoxically) that 'rebut[tal]' would be allowed in some circumstances *before* the presumption was invoked." Dir. Br. at n. 16 (emphasis in text). However, the Director's strained reading of the Manual is incorrect. Section IB6(d) of the Manual does not state that the rebuttal to which it refers should occur before invocation or vary in any other way from the rebuttal that § 410.490(c) itself provides. Indeed, if the rebuttal that IB6(d) of the Manual set forth did vary from, and were inconsistent with, the rebuttal that the HEW interim provision itself provides, the HEW interim provision's rebuttal would govern and the Manual's rebuttal would not be entitled to deference. *See Mullins*, 484 U.S. at 159.[16]

b. HEW's Contemporaneous Interpretation Of Its Interim Provision And The Case Law. That the HEW interim provision operates as described in § I.A.2.a *supra* is not only apparent from the case law, *e.g.*, *Sharpless v. Califano*, 585 F.2d 664, 666 (4th Cir. 1978), but is confirmed by HEW's Coal Miner's Benefits Manual, which includes HEW's contemporaneous and detailed interpretation of its interim provision. Indeed, the very structure of the Manual's sections pertaining to the HEW interim provision supports our construction. Section IB6(c) of the Manual contains only two subparagraphs, one parallelling § 410.490(b)(1) of the HEW interim provision, Manual § IB6(c)(1), and the other parallelling § 410.490(b)(2). Manual § IB6(c)(2). But the Manual does not include in § IB6(c) a third subparagraph parallelling § 410.490(b)(3). Rather, the Manual sets forth its provision paralleling § 410.490(b)(3)

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[16] A different Manual section, § IB6(e)(3), is, however, plainly erroneous because it is inconsistent with § 410.490 itself. Section IB6(e)(3), which provides that the HEW interim presumption will be rebutted "if [b]iopsy or autopsy findings clearly establish that no pneumoconiosis exists," Manual § IB6(e)(3), is a rebuttal test that HEW did not enumerate in the text of the HEW interim presumption but nevertheless included in the Manual. Section IB6(e)(3) has no operative effect in these consolidated cases because no party submitted biopsy or autopsy evidence in any of them. Nevertheless, that Section IB6(e)(3) appears in the Manual is significant. First, that it appears only in the Manual confirms that under the HEW interim provision itself the presence of medical pneumoconiosis is conclusively presumed in ventilatory study cases. This is significant because in 1972, when HEW promulgated its interim provision, a miner could not satisfy the legal definition of pneumoconiosis without having medical pneumoconiosis. 30 U.S.C. § 902(b) (1970 & Supp. II 1972). The legal definition had not yet been broadened to include respiratory and pulmonary impairments other than medical pneumoconiosis. *See* p. 27 *infra*. Second, that the Manual added only the medical pneumoconiosis rebuttal test at § IB6(e)(3) emphasizes the absence from the HEW interim provision of a rebuttal test or factual inquiry concerning either "disability causation" or the presence of legal pneumoconiosis.

as the first of two unenumerated paragraphs in an entirely separate *section*, § IB6(d). By structuring its Manual provisions this way, HEW clarified that § 410.490(b)(3) is not a third co-equal invocation requirement but, consistent with the express terms of the HEW interim provision, is a means of satisfying the causation requirement at § 410.490(b)(2) in ventilatory study cases. That the other paragraph of § IB6(d), which pertains to x-ray cases, also describes a means of satisfying the causation requirement of § 410.490(b)(2) further confirms this conclusion. Manual § IB6(d). Because Sections IB6(c) and IB6(d) of the Manual are not "plainly erroneous or inconsistent with the regulation," they "deserve[ ] substantial deference." *Mullins Coal Co v. Director, O.W.C.P.*, 484 U.S. 135, 159 (1987) (citation omitted).

c. The Circumstances Attending Adoption Of The HEW Interim Provision. A successful claimant must satisfy four elements: (a) that he has pneumoconiosis, (2) that his pneumoconiosis arose out of coal mine employment (*i.e.*, "disease causation"), (3) that he is unable to perform his usual coal mine work or comparable work (*i.e.*, "disability severity"), and (4) that he meets the "disability severity" standard because of his coal mine employment (*i.e.*, "disability causation"). *See Sebben*, 488 U.S. at 114 (enumerating three elements of a claim, one of which, denominated "total disability," included both the "disability severity" and "disability causation" elements). A claimant who successfully invokes the HEW interim provision using either x-ray or ventilatory study evidence must withstand the two rebuttal inquiries—whether he is doing, or is able to do his usual coal mine employment, §§ 410.490(c)(1) and (c)(2)—both of which address the "disability severity" element of a claim.

In x-ray cases, a claimant's x-ray, biopsy, or autopsy evidence also proves the presence of pneumoconiosis element, § 410.490(b)(1)(i), and, unless he worked in the mines

at least the ten years necessary to obtain the presumption at § 410.416 or § 410.456, he must prove the "disease causation" element at § 410.490(b)(2). However, as petitioner Pauley explains in 89-1714 Pet. Br. at Argument § I.A, a miner in an x-ray case need not prove the "disability causation" element, which is conclusively presumed.

The HEW interim provision operates differently in ventilatory study cases than it does in x-ray cases because the two forms of evidence show different things. Medically, "pneumoconiosis" is defined as "inflammation commonly leading to fibrosis of the lungs due to irritation caused by the inhalation of dust incident to various occupations, such as coal mining, knife grinding, stone cutting, etc." Stedman's Medical Dictionary 1108 (24th ed. 1982). The Act, as it read when the HEW interim provision was promulgated in 1972, set forth an abbreviated version of the medical definition of "pneumoconiosis" but narrowed the medical definition by including only medical pneumoconiosis "arising out of coal mine employment." 30 U.S.C. § 902(b) (1970 & Supp II 1972).[17] While x-ray, biopsy, and autopsy evidence are the forms of evidence that show the presence of medical pneumoconiosis, §§ 410.490(b)(1)(i), ventilatory studies show only a "chronic respiratory or pulmonary disease," § 410.490(b)(1)(ii), which may or may not be medical pneumoconiosis. Indeed, unable to prove by x-ray, biopsy, or autopsy evidence that he had medical pneumoconiosis, a claimant in a ventilatory study case could not possibly prove affirmatively that he had "pneumoconiosis" within the meaning of the Act as it read in 1972.

The only other way HEW could have allowed an inquiry addressing whether the miner had pneumoconiosis would

[17] As amended in 1978, Black Lung Benefits Reform Act of 1977, Pub. L. 95-239, § 2(a), 92 Stat. 95 (1978), the Act broadened the statutory definition of "pneumoconiosis" to include all respiratory and pulmonary impairments, whether medical pneumoconiosis or not, that arise out of coal mine employment. 30 U.S.C. § 902(b).

have been to allow the claimant's opponent to prove that the respiratory or pulmonary disease shown by the claimant's ventilatory studies could not possibly meet the statutory definition of "pneumoconiosis" because such disease, whatever it is, does not arise out of coal mine employment. Significantly, however, any such inquiry would necessarily have addressed not only the presence of pneumoconiosis element of a claim but also the "disease causation" and "disability causation" elements as well. Specifically, such an inquiry would necessarily have addressed the "disease causation" element because it would have allowed the claimant's opponent to prove that the disease shown by claimant's abnormal ventilatory studies, whether that disease was medical pneumoconiosis or not, did not arise out of coal mine employment. Similarly, such an inquiry would necessarily have addressed the "disability causation" element as well because it would have allowed the claimant's opponent to prove that the functional impairment shown by the abnormal ventilatory studies did not arise out of coal mine employment.[18]

For the reasons discussed in petitioner Pauley's brief (89-1714 Pet. Br. at 28-30), HEW chose to draft its interim provision to presume the "disability causation" element conclusively. As we have explained, however, HEW could not have drafted its interim provision to presume the "disability causation" element conclusively in ventilatory study cases without conclusively presuming the presence of pneumoconiosis and "disease causation" elements in such cases as well. Moreover, by requiring claimants in ventilatory study cases to prove affirmatively both that they have a respiratory or pulmonary impairment

[18] Besides showing the presence of disease(s), abnormal ventilatory studies show functional impairment, 45 Fed. Reg. 13683 (1980), which could meet the standard of the "disability severity" element of a claim either alone or in conjunction with one or more non-respiratory impairments.

of a specified degree, § 410.490(b)(1)(ii), and that they worked in the mines at least ten years, § 410.490(b)(3), and then to withstand rebuttal addressing whether they meet the requisite "disability severity" standard, §§ 410.490(c)(1), (c)(2), the HEW interim provision subjects claimants in ventilatory studies to as many relevant factual inquiries as possible without subjecting them to a "disability causation" factual inquiry.

B. In Cases In Which The Claimant Meets The Invocation Requirements Of The HEW Interim Provision By Ventilatory Study Evidence, The DOL Interim Regulation's Rebuttal Tests At §§ 727.203(b)(3) And (b)(4) Violate Section 402(f)(2) Of The Act.

1. If this Court accepts our position that the "disability causation" and presence of pneumoconiosis rebuttal tests at §§ 727.203(b)(3) and (b)(4) are more restrictive than the criteria the HEW interim provision sets forth, *see* § I.A. *supra*, then affirmance of the judgment below is required because the "disability causation" and presence of pneumoconiosis criteria in §§ 727.203(b)(3) and (b)(4) are the types of "criteria" that Section 402(f)(2) says cannot be more restrictive in the DOL interim regulation than they are in the HEW interim provision. *See Sebben*, 488 U.S. at 114.

First, as petitioner Pauley explains (89-1714 Pet. Br. at 30-31), this Court's decision in *Sebben* strongly supports reading the term "criteria" in Section 402(f)(2) to mean all criteria "applicable to a claim filed on June 30, 1973." 30 U.S.C. § 902(f)(2). Such criteria encompass *all* criteria in the HEW interim provision, *see Sebben*, 488 U.S. at 113-116, including its criteria for "disability causation" and the presence of pneumoconiosis, both of which, in ventilatory study cases, are conclusively presumed.

Congress placed Section 402(f)(2) in Section 402(f), which defines "total disability;" and this placement, the Secre-

tary of Labor argued in *Sebben*, suggests that the term "criteria" in Section 402(f)(2) may be limited to "total disability" criteria. *See Sebben*, 488 U.S. at 114 (characterizing that reading as having "merit, though . . . by no means [being] free from doubt"). But that reading of the term similarly obliges the conclusion that the presence of pneumoconiosis and "disability causation" criteria at issue here *are* Section 402(f)(2) "criteria." This is because the statute itself defines "total disability" specifically to include these criteria. Section 402(f)(1)(A) thus states that regulations defining "total disability" shall "provide that a miner shall be considered totally disabled" when [1] "pneumoconiosis," defined in Section 402(b), 30 U.S.C. § 902(b), to include a certain respiratory disease [2] arising out of coal mine employment, [3] "prevents him or her from [4] engaging in gainful employment requiring skills and abilities [of certain types.]" Parsing the statute in this way, the statutory definition of "total disability" includes: element 1, *the presence of the disease pneumoconiosis*; element 2, "disease causation;" element 3, "*disability causation*;" and element 4, "disability severity."[19]

Moreover, in *Sebben* this Court held that a particular requirement of the DOL interim regulation that "bears

[19] Remarkably, the coal companies in this case and in No. 90-113 urge that the "'criteria' referred to in [30 U.S.C.] Section 902(f)(2) must be criteria for determining whether a miner is totally disabled or died due to pneumoconiosis," Coal Co. Br. at 34, but then ignore the statutory definition of "total disability," which plainly includes both the presence of pneumoconiosis and "disability causation" criteria, in urging that the latter criteria are *not* Section 402(f)(2) "criteria." In *Sebben*, the Director argued that the term "criteria" in Section 402(f)(2) should be limited to "total disability" criteria relating to the "severity" of a claimant's impairments. *See Sebben*, 488 U.S. at 114. However, he has abandoned any such suggestion here perhaps because, as we explain in the text, such a limitation is without support in Section 402(f)(1)(A). *See id.* (specifically defining "total disability" as the "inability of the claimant to do his former coal mine work or the equivalent *because of pneumoconiosis*") (emphasis added).

proximately upon" one criterion violates Section 402(f)(2) if it "bears *ultimately* upon" some other criterion that the word "criteria" in Section 402(f)(2) concededly encompasses (*e.g.*, the "disability severity" criterion). *Sebben*, 488 U.S. at 114 (emphasis in original). Here, as the Director expressly acknowledges (Dir. Br. at 26 n. 21), both the presence of pneumoconiosis and the disability causation "rebuttal provisions at issue" *do* bear ultimately upon whether the "severity" of a claimant's disability is "presumed." *Id.* (citing *Sebben*, 488 U.S. at 114); *see also* 89-1714 Pet. Br. at 33 n. 23 (explaining more fully the significance of such an acknowledgement).

2. The Director quotes that part of Section 402(f)(2) that refers to "criteria *applicable* to a claim filed on June 30, 1973," Dir. Br. at 25 (emphasis added), and says that the question before the Court is "what criteria Congress understood to apply to Part B claims, not what criteria HEW actually applied." *Id.* He then suggests, by using a hypothetical "involving corruption," that if the HEW interim provision were read to incorporate a conclusive presumption of the presence of pneumoconiosis or "disability causation," it might be unlawful. Dir. Br. at 25 n. 20. He also points out that the ventilatory study table values that the Secretary of Labor included in the DOL interim regulation were the same, and therefore no more restrictive than, those in the HEW interim provision. *Id.* at 26. He notes further that other presumptions applicable to Part B claims—those in Sections 411(c)(1) and (c)(4) in particular—do not carry with them conclusive presumptions of either the presence of pneumoconiosis or "disability causation." *Id.* at 26-28. He observes as well that in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), this Court construed Section 422 of the Act to impose liability upon a coal operator only "for pneumoconiosis arising out of employment in a coal mine." Dir. Br. at 28 (citing *Turner Elkhorn Mining*, 428 U.S. at 22 n. 21).

Finally, he cites in passing (Dir. Br. at 28 n. 22) Section 413(b), 30 U.S.C. § 923(b), requiring DOL to consider "all relevant evidence." He says that the cumulative import of these factors makes it "[un]reasonable" to conclude that the Congress that enacted Section 402(f)(2) believed that benefits could be awarded to claimants under Part B (and under the HEW interim provision in particular) absent factual inquiries concerning "disability causation" and the presence of pneumoconiosis. *Id.* at 25-28.

We agree that, for purposes of Section 402(f)(2) analysis, the central question is what "criteria" were "applicable" under Part B (and under the HEW interim provision in particular), not what criteria HEW actually applied. The criteria HEW actually applied, however, constitute substantial evidence of the criteria HEW thought were "applicable." *See Bowen v. Georgetown University Hospital*, 488 U.S. 204, 211 (1988) (declining to defer to agency's current interpretation of Medicare Act provision when that interpretation was inconsistent with agency's "past implementation of that provision.") In this context, the Director's inability to cite a single case in which HEW denied benefits under its interim provision in a ventilatory study case based on a factual inquiry into the presence of medical pneumoconiosis or "disability causation" weighs heavily, if not conclusively, in Mr. Dayton's favor.

The Director contends that the Congress that enacted Section 402(f)(2) was entitled to presume that the HEW interim provision it was incorporating into the statute was lawful and that this Court should not lightly assume that Section 402(f)(2) gave statutory force to regulatory provisions that violated the statute. Dir. Br. at 25-28. The central problem for the Director in this regard is that the HEW interim provision's conclusive presumptions of the presence of pneumoconiosis and "disability causation" in ventilatory study cases did not make that provision unlawful. As petitioner Pauley has explained (89-1714 Pet.

Br. at 40-41 n. 25), the Act in 1972 gave the Secretary of HEW legislative authority to write regulations defining the eligibility standards for Part B claims. This means that any regulations HEW issued in 1972 that "prescribe[d] standards" defining "total disability" were lawful unless they were "arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984); *see also Batterton v. Francis*, 432 U.S. 416, 425 (1977). The Director, however, makes no directed argument whatsoever that conclusive presumptions of the presence of pneumoconiosis and "disability causation" ran afoul of this expansive standard, limiting himself to one hypothetical (and bizarre) example of a criterion that clearly would have been unlawful if applied to Part B claims.[20] That example falls far short of the requisite showing.[21]

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[20] The example the Director employs hypothesizes that HEW awarded benefits under its interim provision to "any claimant who bribed a claims adjudicator." Dir. Br. at 25 n. 20.

[21] Such a showing cannot be made at all. As petitioner Pauley explains in some detail (89-1714 Pet. Br. at 3-6, 28-30), the conclusive presumption of "disability causation" in the HEW interim provision is properly understood as the product of a reasonable agency cost/benefit analysis.

This same analysis, as applied to ventilatory study cases, explains why the HEW interim provision conclusively presumes the presence of pneumoconiosis in ventilatory study cases. *See* pp. 26-29 *supra*. It is also noteworthy that the same Congress that had directed the Secretary of HEW to develop interim criteria that would expedite the processing of claims, S. Rep. No. 743, 92d Cong., 2d Sess. 18 (1972), had been "presented with significant evidence demonstrating that x-ray testing that fails to disclose pneumoconiosis cannot be depended upon as a trustworthy indicator of the absence of the disease." *Turner Elkhorn Mining*, 428 U.S. at 31-32; *see also Mullins*, 484 U.S. at 151-52. The Surgeon General had also testified before Congress that the "15-year point marks the beginning of a linear increase in the prevalence of the disease [pneumoconiosis] with years spent underground. . . ." *Turner Elkhorn Mining*, 428 U.S. at 31. Finally, Congress had concluded that the "limited medical resources" in

(Footnote continued on following page)

Nor does the fact that the DOL interim regulation incorporates the ventilatory study table values of the HEW interim provision help the Director. As the Director himself emphasizes (Dir. Br. at 25), the Congress that passed Section 402(f)(2) was concerned that the Secretary of Labor not impose on Part C claims *any* "more . . . restrictive" criteria than were "applicable" to Part B claims. Accordingly, that the ventilatory study table values in the DOL interim regulation are not more restrictive than those in the HEW interim provision is irrelevant, the question here being, as the Director acknowledges (Dir. Br. at 26 n. 21), whether the "disability causation" and presence of pneumoconiosis rebuttal tests at §§ 727.203(b)(3) and (b)(4) are more restrictive than the criteria in the HEW interim provision.

[21] *continued*
coal mining areas and the "state of the [medical] art" each made it difficult for miners to prove that they suffered from pneumoconiosis or that it contributed to their disability. S. Rep. No. 743, 92d Cong., 2d Sess. 9, 18 (1972). In this context, the HEW interim provision, as it operates in ventilatory study cases, is properly understood to afford a conclusive presumption of medical pneumoconiosis when: (a) the miner has worked in the mines a sufficient number of years that the respiratory impairment from which he suffers (as measured by the table values in § 410.490(b)(1)(ii)) is likely to be medical pneumoconiosis; (b) the medical evidence that an operator would most likely proffer to show that the miner did not have medical pneumoconiosis—x-ray evidence—was evidence Congress regarded as "untrustworthy" evidence of the absence of that disease; and (c) it was, in any event, very difficult for miners to secure medical evidence that might counter any rebuttal evidence of the absence of pneumoconiosis that the operator would be permitted to put forward. We note also that, in apparent reliance on the Senate Committee's direction that eligibility should be considered for miners with severe respiratory impairments and "many years of coal mine work, though short of fifteen," S. Rep. No. 743, 92d Cong., 2d Sess., 11-12 (1972), HEW permitted invocation of its interim presumption by a showing of qualifying ventilatory study evidence and *ten* years of coal mine work, the Surgeon General's testimony concerning 15 years notwithstanding. *See* Manual § IB6(d) (cross-referencing Manual § IB3(b), including Manual § IB3(b)(4)); § 410.414(b)(4).

The Director's reliance on the presumptions at Sections 411(c)(1) and (c)(4) of the Act is merely a modest rhetorical reformulation of the point he pressed before the court of appeals: that the HEW interim provision should not be construed to "fundamentally change the statutory scheme," which he characterized as generally *not* affording conclusive presumptions of either the presence of pneumoconiosis or "disability causation." Dir. 4th Cir. Br. at 19. And petitioner Pauley has persuasively refuted this contention as well. 89-1714 Pet. Br. at 37-38.

Petitioner Pauley also answers the Director's reliance on Section 422 of the Act, which this Court in *Turner Elkhorn Mining* discussed. 428 U.S. at 222 n. 21. As Mrs. Pauley explains (89-1714 Pet. Br. at 46), Section 422(c) is a provision that, by its terms, relates solely to the *liability* of coal operators for benefits payable to eligible miners, permitting an operator to avoid liability for the payment of benefits to a miner already found eligible for them if it shows that the miner's disability or death due to pneumoconiosis "did not arise, at least in part" out of employment in one of the operator's own mines.[22] Contrary to the Director's suggestion (Dir. Br. at 26, 28), our reading of Section 402(f)(2)—that it establishes conclusive presumptions of the presence of pneumoconiosis and "disability causation" in ventilatory study cases for *eligibility*

[22] In a ventilatory study case, this standard permits the operator to avoid liability by proving either that the miner did not have pneumoconiosis or that his disability was not "due to pneumoconiosis," since if the miner did not in fact have pneumoconiosis at all, then obviously his death or disability did not arise out of employment in the operator's mines.

Mrs. Pauley explains more fully (89-1714 Pet. Br. at 46) that an operator who meets his burden of proof under Section 422(c) only shifts liability for payment of benefits to the Black Lung Disability Trust Fund, 26 U.S.C. § 9501(d)(1)(B); 30 U.S.C. § 932(j), but does not defeat the claim of a miner who establishes his eligibility under other provisions of the Act and regulations—here Section 402(f)(2) and the HEW interim provision.

purposes—is not inconsistent with Section 422(c), which authorizes factual inquiries into both the presence of pneumoconiosis and "disability causation" for *liability* purposes.

Nor does Section 413(b), providing for the consideration of "all relevant evidence" in the adjudication of claims, offer the Director any support.[23] As the Seventh Circuit held in denying the Director's petition for rehearing in *Taylor v. Peabody Coal*, 892 F. 2d 503 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3725 (May 2, 1990) (No. 89-1696), the Section 413(b) directive to consider "all *relevant* evidence" cannot be read to "alter any substantive rule of law," such as that contained in Section 402(f)(2) and the HEW interim provision. Order denying rehearing in *Peabody Coal Co.* at 89-1696 App. 2a (emphasis added). The analytically decisive distinction is between, on the one hand, determinations of whether a "piece of evidence [is] 'relevant' " and "admissib[le]" and, on the other, the "substantive law" that governs the merits of the question being determined in the evidentiary proceeding. *Id.* The governing substantive law here is the "criteria" in Section 402(f)(2) that set forth the statutory standard of restrictiveness for the DOL interim regulation. A "standard of admissability" such as that contained in Section 413(b) "cannot control [this] substantive law." *Id.*; *see also* 89-1714 Pet. Br. at 35-37 (also discussing Section 413(b)). Because whether a miner has pneumoconiosis is irrelevant

[23] In the court below, the Director also relied on Section 413(b) and on a statement in the conference report accompanying the 1978 amendments that regulations promulgated pursuant to Section 402(f)(2) "shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973, except that in determining claims under such criteria, all relevant medical evidence shall be considered. . . ." H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. 16 (1978). *See* Dir. 4th Cir. Br. at 17-18. In this Court, however, he does not refer to the conference committee statement, which, for the reasons petitioner Pauley explains (89-1714 Pet. Br. at 35-37), offers no support for his position in any event.

under the HEW interim rebuttal tests, Section 413(b) does not require the Secretary to consider evidence concerning the presence of absence of pneumoconiosis in determining whether opponents have rebutted particular claims.

3. As we have explained in § I.A *supra*, the interpretation of the HEW interim provision that the coal companies in this case and in No. 90-113 proffer diverges sharply from that of the Director. In contrast, the coal companies' interpretation of Section 402(f)(2) tracks the corresponding interpretation of the Director quite closely. *Compare* Coal Co. Br. at 33-40 *with* Dir. Br. at 25-28. Accordingly, in answering the Director's arguments concerning Section 402(f)(2), we have already addressed most of the points the coal companies raise. Moreover, petitioner Pauley anticipated and answered (89-1714 Pet. Br. at 35-38) the coal companies' continued reliance (Coal Co. Br. at 40) on the "all relevant medical evidence" proviso in the conference report accompanying the 1978 amendments. We adopt that response here.

The coal companies also rely (Coal Co. Br. at 34) on Section 401(a) which, they emphasize, says that the "purpose" of the Benefits Act is to provide "benefits . . . to coal miners who are totally disabled *due to pneumoconiosis*. . . ." (emphasis added). And they pair that provision (Coal Co. Br. at 34-35) with Section 402(f)(1)(A), discussed at p. 30 *supra*. Reading Sections 401(a) and 402(f)(1)(A) together, the coal companies conclude that our reading of Section 402(f)(2), under which the presence of pneumoconiosis and "disability causation" are conclusively established upon proof of other significant facts, does not "fit very well" into the " 'provisions' " and " 'policy' " of the Act, and therefore should be rejected. Coal Co. Br. at 34 (quoting *Dole v. United Steelworkers of America*, 110 S. Ct. 929, 934 (1990)).

This analysis is erroneous in numerous respects, all of which petitioner Pauley exposes. *See* 89-1714 Pet. Br. at 38-44.[24] However, the principal deficiency besetting the coal companies' reliance on both Section 401(a) and Section 402(f)(1)(A) is the same: as Mrs. Pauley explains more fully (89-1714 Pet. Br. at 10-12, 43-44), such reliance ignores the fact that Section 402(f)(2) was compromise legislation that resolved a legislative struggle between coal miners and the industry. *See Sebben*, 488 U.S. at 140 (Stevens, J., dissenting).

C. The Secretary Of Labor's Latest Interpretations Of The HEW Interim Provision And Section 402(f)(2) Are Not Entitled To Deference.

The Director and the coal companies in this case and in No. 90-113 both plea for deference to the Secretary of Labor's current interpretation of "the Black Lung Benefits Act." Dir. Br. at 32-33; Coal Co. Br. at 40-41. However, because Section 402(f)(2) of the Act interrelates with the HEW interim provision—the former provision adopting the latter as the *statutory* standard of restrictiveness—the joint plea is one that asks for deference to the Secretary's reading of both provisions.

The joint plea for deference is unavailing.

1. An agency's interpretations of its own regulations are generally entitled to considerable deference. *Udall v. Tallman*, 380 U.S. 1, 16 (1965). However, so far as deference to the Secretary of Labor's reading of the HEW interim provision as a regulation is concerned, this general rule is inapplicable, as that provision was not her regulation but was the Secretary of HEW's. *See Department of Treasury v. FLRA*, 837 F.2d 1163, 1167 (D.C. Cir. 1988). If deference is owing to an agency understanding of

[24] Mrs. Pauley's discussion also answers the Director's companion reliance (Dir. Br. at 19) on Section 401(a).

§ 410.490 in ventilatory study cases, the relevant understanding is that of HEW. As we have explained in § I.A.2.b *supra*, HEW's interpretation of its interim provision, which HEW set forth in its Coal Miner's Benefits Manual, supports our view that both the presence of pneumoconiosis and "disability causation" are conclusively presumed in ventilatory study cases.

2. Deference to an administrative agency's construction of a statute is inappropriate if a court, "[e]mploying traditional tools of statutory construction," is able to discern Congress' intent in enacting the measure. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432, 446 (1987). *Accord NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987). Here, those tools, principally the statutory text itself, do permit this Court to decide what the statute, and Section 402(f)(2) in particular, means. *See* § I.B. *supra*. Indeed, the Court decided the closely analogous question presented in *Sebben* against the Secretary of Labor without deferring to the understanding of Section 402(f)(2) that the Secretary profferred there. *Sebben*, 488 U.S. at 113-118. For the same reasons, the Secretary's view of Section 402(f)(2) is not entitled to any deference here either.

3. These important considerations aside, the normal rules governing deference to an agency's views of its own regulations and of the statute it administers simply do not apply here. The Senate committee report accompanying the 1978 amendments to the Act expressed the expectation that, in interpreting the amendments, the Secretary of Labor would "give the benefit of any doubt to the coal miner." S. Rep. No. 209, 95th Cong., 1st Sess. 13 (1977). DOL, by regulation, has bound itself to comply with this congressional directive. § 718.3(c). Accordingly, the applicable deference principles are very nearly the opposite of what they would be in the usual case, where, if deference is owing at all, the agency view will usually be up-

held if it is "reasonable," or sometimes merely "permissible." *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 843-44 (1984). Here the agency itself is obliged to defer to the *claimants'* interpretation of the statute if *it* is reasonable or permissible and favorable to coal miners. We submit that our interpretation of the HEW interim provision and Section 402(f)(2), which is clearly more favorable to coal miners than the Secretary of Labor's, is both reasonable and permissible. *See* §§ I.A. and I.B. *supra*. Accordingly, the Secretary of Labor should have adopted it, and the contrary interpretations she did adopt are not entitled to deference.

4. An agency construction of a statute or regulation that is neither "consistent" nor "contemporaneous" with the enactment or promulgation of the statute or regulation being construed is not worthy of deference. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212-13 (1988). (declining to give any deference to agency's "current interpretation" of statute advanced in this Court, when it was "contrary to the . . . view of . . . [the statute] advanced in past cases. . . .").

a. The Secretary of Labor's current interpretation of the HEW interim provision, far from being contemporaneous with the promulgation of that regulation in 1972, dates only from the Director's submission of his brief to this Court in this case in December 1990. So far as we are aware, that submission marked the first time, in any forum adjudicating the several hundred thousand § 410.490 cases that have been decided, that the Secretary ever maintained that § 410.490(b)(2) authorizes defeat of a claim under the HEW interim provision by factual showings that the claimant did not have pneumoconiosis or that his disability was not "due to pneumoconiosis." Indeed, prior to the submission of the Director's brief here, the Secretary did not even consistently maintain in the many Section 402(f)(2) cases that *anything* in § 410.490 incorporated such directives. For example, the Director's brief on the

merits in the Fourth Circuit in this very case contains not a hint of any reading of the HEW interim provision under which it provided factual inquiries into the presence of pneumoconiosis or "disability causation" at either the invocation or rebuttal stage. Dir. 4th Cir. Br. Moreover, when the Secretary changed positions to advance such a reading, as she did in the Director's petition for rehearing below, she based it on her reading of the parenthetical references in §§ 410.490(c)(1) and (c)(2), not on § 410.490(b)(2). Director's Petition for Rehearing and Suggestion for Rehearing In Banc at 7-8, *Dayton*, 895 F.2d 173.[25]

[25] The Director points out (Dir. Br. at 33 n. 28) that in the comments accompanying promulgation of the DOL interim regulation, the Secretary stated that she did not believe that HEW considered its two express rebuttal tests at § 410.490(c) to be exclusive. 43 Fed. Reg. 36826 (1978). That passing unexplained observation, however, hardly constitutes the type of "thorough [ ] . . . judgment" to which deference might be owing, even if § 410.490 were a DOL regulation. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see also Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287 n. 5 (1978). Moreover, until he submitted his brief to this Court in this case, this observation was never tied to the interpretation of the HEW interim provision the Director now proffers. To the contrary, the Director has consistently relied on the 1978 comment about the exclusivity of the HEW interim provision's rebuttal tests as a statement supporting the very position he has now abandoned, that the parenthetical citations to § 410.412(a)(1) in §§ 410.490(c)(1) and (c)(2) imported these factual inquiries into the HEW interim provision. *E.g.*, Respondent Director's Petition for Rehearing and Suggestion for Rehearing En Banc at 12 n.6, *Clinchfield Coal Co.*, 895 F.2d 178 (citing 43 Fed. Reg. 36826 in support of the proposition that "[t]his interpretation of the HEW regulation [relying on the parenthetical citations to § 410.412(a)(1)]" is one that "the Department of Labor has consistently" relied upon to support the view that "all four methods of rebuttal contained in the DOL presumption" were contained in the rebuttal subsection of the HEW interim provision as well); Brief of the Federal Respondent at 19-20, *Bethenergy Mines*, 890 F.2d 1295 (citing M. Solomons, *A Critical Analysis of the Legislative History Surrounding The Black Lung Interim Presumption and a Survey of Its Unresolved Issues*, 83 W. Va. L. Rev. 869, 880 (1981)). (Mr. Solomons, the author of that article, was also the "principal author" of the DOL interim regulation. 43 Fed. Reg. 17766 (1978).)

b. Upon enactment of the 1978 amendments, the Secretary of Labor promulgated regulations at 20 C.F.R. Part 727. 43 Fed. Reg. 36818-31 (1978). Section 727.200 of those regulations, entitled "Basis for criteria," provided:

> In enacting the Black Lung Benefits Reform Act of 1977, Congress provided that the *criteria for determining whether a miner is or was totally disabled or died due to pneumoconiosis shall be no more restrictive* than the criteria applicable to a claim filed with the Social Security Administration on or before June 30, 1973 under Part B . . . of the Act (the interim adjudicatory rules).

§ 727.200 (emphasis added). Contemporaneously with the 1978 amendments, the Secretary therefore construed the word "criteria" in Section 402(f)(2) to include *all* criteria under the HEW interim provision, including the presence of pneumoconiosis and "disability causation" ("criteria for determining . . . total disab[ility] . . . due to pneumoconiosis").[28] Under this interpretation of the amendment, none of these criteria could be more restrictive in the DOL interim regulation than they were in the HEW interim provision.

After issuing her contemporaneous construction of Section 402(f)(2) at § 727.200, the Secretary reversed course and told the Third Circuit in *Halon v. Director, O.W.C.P.*, 713 F.2d 30 (3d Cir. 1982) ("*Halon I*") that Section 402(f)(2) *did* permit her to apply criteria under the DOL interim regulation that were less favorable than those

[28] To be sure, even though the Secretary properly construed Section 402(f)(2) in § 727.200, the DOL interim regulation failed to honor this construction by including presence of pneumoconiosis and "disability causation" factual tests for ventilatory study cases where there were none in the HEW interim provision. *See* § I.A. *supra*. In *Sebben* this Court considered a related inconsistency between § 727.200 (the DOL's regulatory *construction* of the statute) and § 727.203 (the DOL's regulatory *implementation* of the statute).

under the HEW interim provision, so long as the number of claimants treated less favorably was balanced by at least an equal number of claimants treated more favorably. Brief for the Respondent Director, O.W.C.P. at 17-19, *Halon I*. In his petition for rehearing in *Halon I*, however, the Secretary shifted to still another interpretation of Section 402(f)(2), contending that the term "criteria" in that section encompassed only "medical criteria." Petition for Rehearing on Behalf of the Director, O.W.C.P. at 2, 6-11, *Halon I*. The Secretary thereafter adhered to that position in the courts of appeals, *e.g.*, *Strike v. Director, O.W.C.P.*, 817 F.2d 395 (7th Cir. 1987), and in this Court in *Sebben*. *Sebben*, 488 U.S. at 413-14. In *Sebben*, however, this Court rejected the view that the term "criteria" in Section 402(f)(2) could be so limited. *Id.* Now in these consolidated cases, the Secretary advances a contention that seeks to deflect this Court's attention from the literal import of the term "criteria" in Section 402(f)(2). He argues, incorrectly as we have shown, that Congress cannot reasonably be understood to have read the term "criteria" to encompass presence of pneumoconiosis and "disability causation" criteria, principally because, he asserts, *other provisions of the Act* (*e.g.*, Sections 401(a), 411(c), 413(b)) make such a reading illogical. *See* pp. 35-38 *supra*.

c. The Director does not even attempt to explain the inconsistencies between the interpretations of the HEW interim provision and Section 402(f)(2) that the Secretary now advances in this Court and her prior interpretations of the same provisions. *Cf. Greater Boston Television Corporation v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) ("an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored. . . ."). Indeed, the only consistency we can discern among the Secretary of Labor's varying and inconsistent interpretations (other

than her contemporaneous interpretation of Section 402(f)(2) at § 727.200, which supports our position) is that she has advanced each interpretation to defeat the Section 402(f)(2) claims of miners. Because the Secretary's current interpretation of Section 402(f)(2) is one driven by the exigencies of litigation rather than by a principled search for statutory meaning, it is not entitled to deference. *See Motor Vehicle Mgrs. Assoc'n v. State Farm Mut. Auto Ins.*, 463 U.S. 29, 50 (1983).

II. SECTION 402(f)(2) DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The coal companies argue that construing Section 402(f)(2) to invalidate the "disability causation" and presence of pneumoconiosis rebuttal tests at §§ 727.203(b)(3) and (b)(4) would violate their rights under the fifth amendment to the United States Constitution. U.S. CONST. amend V. Coal Co. Br. at 42-46. Specifically, they maintain that the requirements of the fifth amendment's due process clause demand a statutory scheme under which they are afforded an opportunity to avoid liability for payment of any black lung benefits to claimants like Mr. Dayton if they can prove either that the claimants do not have pneumoconiosis or that their disabilities did not arise out of coal mine employment. *Id.* Similarly, the Director—who, as a government official, has no standing to raise any due process challenge to Section 402(f)(2)—says that if that section were construed to bar coal operators from avoiding liability for black lung benefits by proving either that a claimant does "not have pneumoconiosis or . . . [is] not disabled by it," then a "serious constitutional question would be presented." Dir. Br. at 29.[37] The due process objections of the coal companies and the Director are thus to the statutory *liability* scheme that they posit exists if our interpretation of Section 402(f)(2) prevails.

[37] The Director, however, takes no position as to how that constitutional question should be resolved if this Court were to decide it.

As the coal companies acknowledge, in the court below Consolidation Coal Company did not raise the constitutional issue it presses here, and the Director raised the issue only as an adjunct to his *statutory* argument. Coal Co. Br. at 42 n. 49. Accordingly, the court of appeals, citing *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring), declined to consider the constitutional issue. Pet. App. at 6. Some question therefore exists as to whether the constitutional issue has been properly preserved in this case. *See Lawn v. United States*, 355 U.S. 339, 362-63 n. 16 (1958); *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

The coal companies' contention that Section 402(f)(2), as we construe it, is constitutionally infirm is without merit in any event. For the due process objections of the coal companies and the Director are to a statutory liability scheme that does not exist. As petitioner Pauley and we have explained in some detail, Section 422(c) of the Act, 30 U.S.C. § 932(c), allows every operator to avoid *liability* for payment of any black lung benefits in a ventilatory study case, though not defeat the entitlement of the claimant to receive benefits from the Trust Fund, if it can show that the claimant does not have pneumoconiosis or that his disability does not arise out of pneumoconiosis. *See* 89-1714 Pet. Br. at 45-46 and n. 22 *supra*. As in No. 89-1714, an x-ray case, Section 422(c) therefore "completely answers" the constitutional challenge in ventilatory study cases like Mr. Dayton's. 89-1714 Pet. Br. at 48.

Also as in No. 89-1714, and for reasons similar to those petitioner Pauley explains there (89-1714 Pet. Br. at 48-49), Section 402(f)(2) as we construe it in a ventilatory study case would be constitutional even if the Act did not in-

clude a provision like Section 422(c). As the coal companies and the Director acknowledge (Coal Co. Br. at 42; Dir. Br. at 30), Section 402(f)(2) enjoys a strong presumption of constitutionality and could only be found to be constitutionally invalid if this Court concluded that, as we construe the section, it is "arbitrary and irrational." *Turner Elkhorn Mining*, 428 U.S. at 15.

The determination of whether Section 402(f)(2) is "arbitrary and irrational" must be made in terms of its "operation and effect." *Id.* at 24. Section 402(f)(2), when construed to invalidate the "disability causation" and presence of pneumoconiosis rebuttal tests at §§ 727.203(b)(3) and (b)(4) with respect to ventilatory study cases, has the "effect" of affording benefits to miners (1) who have worked at least ten years in the mines, (2) who have a chronic respiratory or pulmonary impairment, (3) whose impairments prevent them from performing their usual coal mine work or its equivalent, (4) whose respiratory or pulmonary impairments are probably, albeit not certainly, pneumoconiosis, and (5) whose inability to perform their usual coal mine work or its equivalent probably, albeit not certainly, arose out of their long term (at least 10 years) coal mine work. *See* pp. 28-29 and n. 21 *supra*. Congress' decision in Section 402(f)(2) to award such miners benefits was not irrational, but, as explained in 89-1714 Pet. Br. at 10-12, 38-43 and at pp. 26-29 and n. 21 *supra*, was the expression of a carefully crafted congressional compromise that incorporated into the statute reasonable "policy choices as a price for conducting programs for the distribution of social . . . benefits." *Weinberger v. Salfi*, 422 U.S. 749, 785 (1975); *see also Mourning v. Family Publications Service*, 411 U.S. 356, 377 (1973). Accordingly, Section 402(f)(2) is the same in constitutional terms as "§ 411(c)(3)'s 'irrebuttable presumption' of total disability due to pneumoconiosis based on clinical evidence of complicated pneumoconiosis," the constitutionality of which this

Court unanimously upheld in *Turner Elkhorn Mining*, 428 U.S. at 22. *Turner Elkhorn Mining* therefore dooms the coal companies' constitutional challenge to Section 402(f)(2) here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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